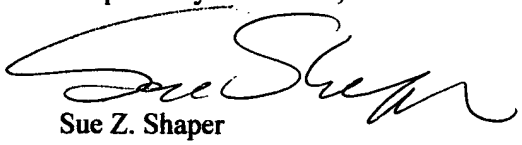
APPLICANT SUMMARY OF EXAMINER INTERVIEW

Applicant's attorney talked with Examiner Morrison on September 7, 2006. The Examiner agreed to write a phone conference summary report, which has been received.

In the phone conference the Examiner clarified that PriceWatch was cited as a CDW. The Examiner could not clarify where, on the cited page 3 of PriceWatch, the Examiner found a common mark or URL to be used by a plurality of CDWs, identifying them as participating in the system. The Examiner also could not clarify where he found a business model, on the cited pages 4-5 of PriceWatch, to be imposed on a plurality of CDWs. (The Examiner agreed that he had noticed in PriceWatch a business model imposed by PriceWatch on the websites which PriceWatch cataloged. Applicant pointed out that this is not what the claim recited. Rather, the claim recites a business model imposed on the CDWs. The Examiner instructed Applicant to make this point in the Response.)

Respectfully Submitted,



Sue Z. Shaper

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors, Bankruptcy, Mortgages, Constitutional Law, Interpretation of Laws, Rescission and Cancellation of Contracts, Etc.

FIFTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

Contributing Authors

JOSEPH R. NOLAN

Associate Justice, Massachusetts Superior Court

and

M. J. CONNOLLY

Associate Professor of Linguistics and Eastern Languages, Boston College

ST. PAUL MINN.
WEST PUBLISHING CO.
1979

Library of Congress Cataloging in Publication Data

Black, Henry Campbell, 1860–1927.
Black's Law dictionary.

First ed., 1891, has title: A dictionary of law.
1. Law—Dictionaries. I. Nolan, Joseph R.
II. Connolly, Michael J. III. West Publishing Company,
St. Paul. IV. Title. V. Title: Law dictionary.
KF156.B53 1979 340'.03 79-12547
ISBN 0-8299-2041-2
ISBN 0-8299-2045-5 deluxe
2nd Reprint—1980

BEST AVAILABLE COPY

Fr. A Latin abbreviation for "fragmentum," a fragment, used in citations to the Digest or Pandects in the *Corpus Juris Civilis* of Justinian, the several extracts from juristic writings of which it is composed being so called.

Fractio /frǽksh(iy)ow/. Lat. A breaking; division; fraction; a portion of a thing less than the whole.

Fraction. A breaking, or breaking up; a fragment or broken part; a portion of a thing, less than the whole.

Fractional. As applied to tracts of land, particularly townships, sections, quarter sections, and other divisions according to the government survey, and also mining claims, this term means that the exterior boundary lines are laid down to include the whole of such a division or such a claim, but that the tract in question does not measure up to the full extent or include the whole acreage, because a portion of it is cut off by an overlapping survey, a river or lake, or some other external interference. Any irregular division whether containing more or less than conventional amount of acreage.

Fractional share. That part or portion of a share of stock indicated on a right or warrant as subject to purchase by the exercise of such right.

Fractional share formula. See **Marital deduction.**

Fractionem diei non recipit lex /frækshiyównəm dayiyay nòn résəpət léks/. The law does not take notice of a portion of a day.

Fraction of a day. A portion of a day. The dividing a day. Generally, the law does not allow the fraction of a day.

Fractitium /fræktish(iy)əm/. Arable land. Mon. Angl.

Fractura naviùm /frækchúrə néyv(i)yəm/. Lat. The breaking or wreck of ships; the same as *naufragium (q.v.).*

Fragmenta /frægméntə/. Lat. Fragments. A name sometimes applied (especially in citations) to the Digest or Pandects in the *Corpus Juris Civilis* of Justinian, as being made up of numerous extracts or "fragments" from the writings of various jurists.

Frais /fréy/. Fr. Expense; charges; costs. *Frais d'un procès,* costs of a suit.

Frais de justice /fréy də zhustíys/. In French and Canadian law, costs incurred incidentally to the action.

Frais jusqu'à bord /fréy jəskà bór(d)/. Fr. In French commercial law, expenses to the board; expenses incurred on a shipment of goods, in packing, cartage, commissions, etc., up to the point where they are actually put on board the vessel.

Framed. When used to describe evidence, word is generally accepted as implying that willful perjurers, suborned by and conspiring with parties in interest to litigation, are swearing or have sworn to matters without any basis in fact. Tri-State Transit Co. of Louisiana v. Westbrook, 207 Ark. 270, 180 S.W.2d 121, 125. Incrimination of person on false evidence. See also **Entrapment.**

Frame-up. Conspiracy or plot, especially for evil purpose, as to incriminate person on false evidence. See **Entrapment.**

Franc aleu /frónk alyúw/. In French feudal law, an allod; a free inheritance; or an estate held free of any services except such as were due to the sovereign.

Franchilanus /frænkəléynəs/. A freeman. A free tenant.

Franchise. A special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right. Artesian Water Co. v. State Dept. of Highways and Transp., Del.Super., 330 A.2d 432, 439. In England it is defined to be a royal privilege in the hands of a subject.

A privilege granted or sold, such as to use a name or to sell products or services. The right given by a manufacturer or supplier to a retailer to use his products and name on terms and conditions mutually agreed upon.

In its simplest terms, a franchise is a license from owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, a "franchise" has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services. H & R Block, Inc. v. Lovelace, 208 Kan. 538, 493 P.2d 205, 211.

Corporate franchise. See that title. See also **Charter.**

Elective franchise. The right of suffrage; the right or privilege of voting in public elections. Such right is guaranteed by Fifteenth, Nineteenth, and Twenty-fourth Amendments to U.S. Constitution.

Exclusive franchise. See **Exclusive agency.**

General and special. The charter of a corporation is its "general" franchise, while a "special" franchise consists in any rights granted by the public to use property for a public use but with private profit.

Sports franchise. As granted by a professional sports association, it is a privilege to field a team in a given geographic area under the auspices of the league that issues it. It is merely an incorporeal right.

Tax treatment. A franchise is an agreement which gives the transferee the right to distribute, sell, or provide goods, services, or facilities, within a specified area. The cost of obtaining a franchise may be amortized over the life of the agreement. In general, a franchise is a capital asset and results in capital gain or loss if all significant powers, rights or continuing interests are transferred pursuant to the sale of a franchise.

Franchise appurtenant to land. Usually a franchise is not regarded as real property or land and is not included in the term "tenement;" but it is sometimes characterized or classified as real property or as property of the nature of real property when exer-

cised in connec
terms, classified
by some statute,

Franchise clause.
cy to the effect
only over a sta
responsible for
This clause diff
the insured bea
deductible amo
clause, once th
the insurer pay

Franchised dealer
manufacturer o
chise which ge
retailer and pr
port to him.

Franchise tax. A
that is, on th
business in th
purposes for w
tions which s
Poplar Bluff
S.W.2d 764, 7

Though the
taxation, may
done, or the a
the total value
tion in excess
not a tax on e
or dividends.
594, 10 S.Ct.
& I. R. Co., 2
1280.

Francia /frǽns(

Francigena /frə
"designation fo
Frenchman.

Franc tenancie
freeholder.

Francus /frǽŋk

Francus bancu

Francus homo
law, a free m

Francus plegiu
a frank plec

Francus tenens
Frank-tenem

Frank, *v.* To s
of postage,
Franking pri

Frank, *adj.*
several com

Frankalmoign
alms. A sp
tions, aggre
them and t
charged of

Franchising Realities and Remedies
Volume 1
Chapter 1. Introduction to Franchising

Harold Brown [FNa]
J. Michael Dady [FNb]
Jeffery S. Haff [FNc]
Ronald K. Gardner [FNd]

§ 1.03 CREATION AND FUNCTION OF THE FRANCHISE RELATIONSHIP

[1]-Definition Concepts: What Is a 'Franchise'?

The nature of a franchise is difficult to define. At the core of all franchising is the licensing of a trademarked product or service. Under the Lanham Act, [FN1] a licensor must exercise quality control over the licensee or risk loss of the trademark. However, the statute does not immunize franchisors from the antitrust laws. [FN2] Neither does the Lanham Act contravene the protective measures adopted by many states such as in the prohibition of any termination or failure to renew a franchise except for 'good cause.' [FN3] Thus, the franchisor may face a dilemma in trying to satisfy the requirements of both laws. As a result, the Lanham Act is the origin of many of the economic and legal problems in franchising. The term 'quality' and its usual companion, 'uniformity,' are claimed to condone subjective standards for the 'control' required by the statute. [FN4] Ultimately, the franchisor's combination of subjective quality standards and broad discretionary control may create a fiduciary relationship. [FN5] However, the overwhelming majority of courts have found that the franchisor/franchisee relationship alone does not impose a fiduciary duty on the franchisor. [FN6] Determining whether a particular business arrangement is actually a franchise often depends upon the local franchise statute and the FTC franchise statute. A New York District Court held that a contract between a furniture supplier and a retailer was a franchise agreement within the meaning of the New York Franchises Law and the FTC Franchise Rule. Under the agreement, the retailer had the right to use the supplier's name and system of operations. The contract required the retailer to carry the supplier's product line as a majority of its inventory and showroom items. The agreement also required that the supplier's product line represent 60% of the retailer's net sales and mandated a $100,000 'license fee.'

Under the New York Franchises Law, a franchise includes an agreement in which the purported franchisee is granted the right to engage in the business of selling goods; either under a marketing plan or system prescribed in substantial part by a franchisor or substantially associated with the franchisor's trademark. The franchisee is required, under the statute, to pay, directly or indirectly, a franchise fee. The Federal Trade Commission defines a franchise as a business arrangement in which a purported franchisee sells goods identified by a trademark; the franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation;

or the franchisor gives significant assistance to the franchisee in the franchisee's method of operation; and the franchisee is required as a condition of obtaining or beginning the franchise operation to make a payment or commitment to pay the franchisor.

The court held that the agreement incorporated the supplier's trademarked goods, selling system and fee. Neither the retailer's participation in the drafting of the contract nor the fact that the required fee was called a license fee prevented the contract from being a franchise agreement. [FN7]

The Illinois District Court has held that a license agreement between a promoter and a nightclub operator did not qualify as a franchise agreement for purposes of the Illinois Franchise Disclosure Act. Although the promoter granted the nightclub operator the right to offer and sell services under a marketing plan in the promoter's brochure, the operator was not required to pay the promoter a franchise fee of $500

or more as required by the statute. The court rejected the operator's argument that its payment of consulting fees to a consulting firm suggested by the promoter constituted a franchise fee. It reasoned that the promoter was not a party to the consulting agreement and was not alleged to be the consulting firm's alter ego. [FN8]

In a violent conceptual collision, some franchisors maintain that a franchise is merely an embellished license and therefore revocable at will. Franchisees contend that a franchise is a license coupled with an interest, not subject to unlimited control by franchisors. Courts have failed to recognize the concept that a franchise relationship (in which a franchisee is promised certain services) is far different from a pure 'license' in which the licensee pays only for use of a name. The prevailing law is that a franchisee who does not receive promised services must still pay all royalties or be terminated. [FN9]

As a result of the conceptual disagreement, legislative draftsmen have had difficulty defining 'franchise.' A proposed generic definition states that a franchise is 'an oral or written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a tradename . . . and in which there is a community of interest in the marketing of goods or services at wholesale, retail, leasing, or otherwise in a business operated under said license.' [FN10] In fact, the authors of this treatise have been able to establish to courts' satisfaction that the following entities were 'franchisees': (1) a snack food distributor, [FN11] (2) a pool and spa distributor, [FN12] (3) a U-Haul dealer, [FN13] and (4) a tractor dealer. [FN14] What governs in court is not the intent of the parties or the labels placed on the relationship by the parties, rather the sole issue for the court is whether the statutory definition is met.

[2]-Functional Aspects

The preceding definition deliberately refrains from providing in detail the extensive rights and duties in the complex franchising relationship. Leaving this role to the courts hopefully will permit them to transcend formalistic reliance on sanctity of contract, free enterprise, and caveat emptor. Instead of using a definition to delineate rights, the realities of franchising should be analyzed. This analysis will show the propriety of additional protection for the franchisee.

A franchise system is a complicated arrangement subject to many variations, and is too often a mystery to the uninitiated. Most attorneys have had little experience in handling franchise cases. Even judges and legislators are generally not knowledgeable on the subject. [FN15]

When a franchisee needs protection it is usually because his bargaining power is no match for the franchisor's, and because of the lack of franchisee associations capable of effectively protecting franchisee interests. Before discussing ways of improving the franchisee's position, it will be helpful to discuss the extent of the franchisor's power, and to elaborate on how that power is wielded to franchisees' detriment.

The meteoric rise of franchising came about because the struggle between large and small competitors soon showed that considerable savings could be realized by use of a trademarked product or service, extensive advertising, and enough retail establishments to support such advertising. Similarly, centralized purchasing facilities could buy for, and distribute to, many outlets more economically. The same considerations applied to merchandising methods, design of facilities, and even to bookkeeping and accounting services.

Similar thinking had spurred the growth in chain store operations, which started in the 1920s, and mushroomed in the 1930s and 1940s. This growth, however, had two shortcomings: the need for large capital funds, and the loss of the incentive inherent only in local owner-management.

[3]-Mutual Contributions

Theoretically, franchising represents the ideal compromise between big business and small businessmen. The franchisor assumes the economic functions of big business, and the franchisee contributes capital and entrepreneurship by becoming an owner-manager. While the franchisor might prefer to have all his franchisees succeed, his success is not tied to the individual franchisee's success. He may decide not to invest his capital or pledge his credit and, provided there are many franchisees and only a small percentage fail, he will not suffer serious harm.

Although variables make it impossible to give a comprehensive 'nutshell' description of the mechanics of a franchise, certain general features can be isolated. The franchisor spends large sums of money for market research to develop the franchise unit, a standardized method of distributing a product or service under a registered mark which can be readily recognized by the consumer. The franchisor then uses his real estate expertise to find both general and specific market locations; pledges his credit for a long-term lease of the site; designs, finances, and arranges for the standardized construction of the facility and for the installation of fixtures and equipment; intensively advertises the trademarked [FN16] and standardized product or services; prepares training manuals; and creates training programs for the day-to-day management of the franchisee's business. [FN17]

Once the franchise is in operation, the franchisor guides the franchisee in every last detail of the business-including marketing, inventory, advertising methods, employment practices, records, accounting, and customer relations. In most instances, the franchisor also assures himself of a captive market for his products or services by requiring the franchisee to deal exclusively with the franchisor for products manufactured or purchased by the franchisor and bearing the franchisor's trade name. Ostensibly for purposes of 'quality control,' the franchisor also reserves the right to approve the franchisee's other suppliers.

The franchisor's control of the franchisee commences with an initial training period, continues throughout the relationship, and is enforced by frequent inspections and detailed orders. This control is based on the franchise agreement, which expressly requires the franchisee to follow the franchisor's instructions on specified matters. Under the agreement, the franchisee's failure to do so could result in termination of the franchise. The franchisee may thus lose his franchise and, under a covenant not to compete, may be barred from engaging in a competitive business within a prescribed territory over a prescribed period of time. Alternatively, the desirability of obtaining additional franchise units may be so great that the franchisees will adhere to the franchisor's every whim solely to achieve expandability.

This 'package' is enticing to the man of moderate capital who wants to go into business for himself. Instead of venturing into uncharted seas, he can join a large organization and sell a standardized, trademarked, well-established, and widely-advertised product or service. He can obtain initial training as well as constant business guidance and supervision. If he has an exclusive territory, he is protected from other franchisees selling the same product. Finally, his initial capital investment to buy the franchise-usually $25,000 to $50,000-is likely to be within his reach. Additional capital payments to establish the business and a percentage of his gross sales to pay for advertising costs are not likely to strike the aspiring franchisee as onerous, although they may prove to be so. It

can cost from $100,000 to over a million dollars to get into business, with no genuine assurance of success.

Given the franchisor's degree of control over the franchisee, the success of a franchise arrangement rests largely on the franchisor's judgment in regard to many factors-e.g., the mark, the product or services offered, the market conditions, the methods of operation, the manuals and training programs, and all the other ingredients of a successful operation. It is assumed that the franchisee knows nothing about such matters, and needs only his capital, his willingness to learn and his ability to work. Miscalculating any of these factors can cause the failure of the franchisee or the franchisor, and the collapse of the structure on which the franchisees have relied. Whether a franchisor fails because of mismanagement, lack of skill, a poor product, lack of capital, ineffective advertising, or any of the other many possible reasons, the effect upon the franchisees is usually disastrous.

Even if the franchisor offers a successful package, a franchisee may fail because of lack of his own ability, insufficient application, or an inherently poor or deteriorating location. The failure rate for franchisees has been widely reported to be less than 10%, thus allegedly justifying some of the repressive features of the franchising system. [FN18] Such reports are wholly groundless and probably grossly wrong. In addition, many franchisees have invested their life savings and work endless hours, but barely eke out an ordinary week's pay, thus suffering crushing disappointment.

[4]-Contracts

Too many franchisees do not consult an attorney or other experts before signing a franchise agreement. In the past, it was not unusual for the franchisee to answer a glowing newspaper or magazine advertisement, receive a 'franchisee kit' in the mail, and then be subjected to high pressure sales talk by long distance phone calls, telegrams, and personal visits from executives or others highly trained in selling techniques. Franchises often were offered at trade conventions, and franchisees commonly executed the documents on the spot, with as little concern as for the purchase of an automobile.

The authors' experience has been that franchisees who will agree to invest $50,000 to $250,000 to start up a franchise will not spend $500 to have a lawyer review their Franchise Agreement and Offering Circular. This is generally because (1) people hate to pay lawyers, and (2) the franchisor tells the franchisee, 'We won't negotiate any terms, so it is a waste of your money.' The result is a badly underinformed franchisee who signs anything put in front of him by the franchisor without understanding anything in the documents.

As a protection to franchisees, both the FTC and numerous states now require extensive pre-disclosure of vital information to prospective franchisees, including the contracts to be signed. A 'cooling-off' period usually requires such disclosures to be made by the time of the first meaningful meeting or at a prescribed time, such as ten days prior to the payment of money or execution of a contract. If profitability data is disclosed, reasonable substantiation must be used and be available for inspection.

Although the prospective franchisee is not necessarily denied an opportunity to study the agreement, ordinarily he has little or no understanding of all the legal and practical implications. Many agreements are the equivalent of thirty to fifty typewritten pages, often in small print. If the prospective franchisee, of his own accord or on the advice of counsel, presses for modification or elimination of potentially onerous provisions, he is likely to find the franchisor unwilling to make any substantial variation in the printed form. The franchisor's refusal is not mere stubbornness. Rather, he has great economic interest in the very provisions the franchisee finds most objectionable.

The inflexibility of franchisors also has psychological overtones. It is designed to prove the franchisor's strength and expertise by serving as a forerunner of the discipline that franchisors normally require. Vacillation during the contract stage would undermine such an image. There are cases, however, where a cavalier attitude can reach incredible proportions.

For example, a national travel agency franchisor required a preliminary $2,500 deposit before the franchisee was approved or ever allowed to see the proposed agreement. If the franchisee was approved but failed to sign the agreement, he forfeited the $2,500. A giant multi-food corporation's franchise agreement provided for a $5,000 forfeiture (euphemistically called 'liquidated damages') if the prospective franchisee failed to go through with the transaction. A large hamburger franchisor required a similar 'blind' $4,000 deposit. Oddly enough, a franchisee seldom will show his franchise agreement to others, even his most trusted advisors.

More often than not, a franchisee believes that all franchise agreements-for his product in particular, and for franchised products in general-are identical to his. While he may think that the essential terms are prescribed by law, nothing could be further from the truth. There is no generally recognized body of law governing the form or substance of a franchise agreement. (Franchisors often tell franchisees that they 'cannot' make any changes. This statement is almost always false.) Under a number of franchise agreements, the franchisor's undertakings are vague or ambiguous, while the franchisee's are clear and precise. Drafting a 'sample' agreement is difficult, not because of technical language, but in establishing fairness in a document that is usually drawn by the stronger party. [FN19]

Even if the franchisee consults counsel before executing the agreement, a lawyer usually will have a difficult time in getting changes accepted. The agreement will have been prepared by able and experienced attorneys, and will contain many objectionable clauses. Efforts to negotiate a fair agreement will be difficult at best. While some clients will accept counsel's advice not to sign an onerous agreement, some franchisees will be so convinced of the economic opportunity, and will have so much faith and confidence in the franchisor that they will sign the agreement anyway.

If an attorney is finally consulted when trouble occurs, he may examine the basic agreement and conclude that there are insurmountable obstacles to effective relief. This feeling may be reinforced by the lack of relevant analytical material in usual sources of guidance-statutes, case law, treatises, and law review articles. In actuality, the situation is far from hopeless. The challenge is to find bases for relief, not only in existing, but also in newly-developing areas of the law. And new procedures have become available to ease the task.

A state court action can raise the usual questions of fraud-with relief in damages or rescission of contract-as well as certain established, though seldom-used principles. For example, doubt exists as to the enforceability of an unduly burdensome noncompetition clause, particularly if a forfeiture is involved. In most situations, a good faith covenant exists, thus giving rise to other forms of redress.

Both Congress and many state legislatures have enacted laws requiring franchisors to deal fairly and equitably with their franchisees, and to prohibit the termination or failure to renew a franchise except for good cause. A vigorous set of standards to protect franchisees has developed under the Federal Trade Commission Act. In addition, there is a movement toward state laws requiring full disclosure presentation prior to the sale of a franchise, buttressed by the FTC trade rule requiring certain minimum disclosures.

Before considering these legal developments, however, it is essential to analyze the franchise relationship and the franchise agreement, with particular emphasis on the economic factors, and on the areas in which abuse may flourish. A cautionary word is in order: although prevalent, bad practices do not exist in every case.

The typical agreement set forth in the Franchise Forms Supplement will be useful for purposes of discussion. [FN20] The specimen agreement authorizes the franchisee to sell the products or services devised by the franchisor; to use the franchisor's distinctive trademarks and physical plant; to benefit from centralized advertising; to obtain training and constant business advice; and to be protected from the encroachment of another franchisee. In return, the franchisee must make a capital payment for the franchise. In addition, he must pay the franchisor a percentage of his gross sales as a royalty fee, and an additional percentage of such sales as his share of advertising costs. He must purchase from the franchisor, or from sources approved by the franchisor. Or, he may buy anywhere, subject to the franchisor's prior approval of both quality and consistency.

The remainder of the agreement concerns operation in conformity with the franchisor's standards, confidential information, financial reports, insurance, transfer of the franchise, termination by either party, and the franchisee's obligation not to engage in a competing business in case of termination.

One of the newest trends is to omit some of the more repressive features from the written document, and to achieve similar results through 'oral announcements.' While open to the same criticisms as the agreement, this technique also complicates the task of proving what the franchisor may be doing.

Some manufacturers and suppliers attempt to avoid compliance with federal and state franchise pre-sale disclosure and regulation by avoiding the use of a written agreement. Where application of a law is dependent on a written contract, most laws only require that a material part of the franchise agreement be in writing and that signatures are not required. This is difficult to accomplish. Unless there is a contractual arrangement to police the quality of the licensee's use of a registered mark, the owner may risk the loss of its proprietary interest in the mark under the federal Lanham Act. [FN21] In addition, other forms of regulation are not dependent on the existence of a written contract.

[5]-Top Ten Things that a Franchisee Should Look for in a Franchise Agreement

Franchisees have, as a general rule, very little bargaining power. In addition, franchise agreements are becoming more and more uniform and less and less favorable to franchisees. Nevertheless, any bargaining power the franchisee has is completely gone once it signs its first contract. Therefore, the franchisee not only should, but as a practical matter must, review the proposed franchise agreement and try to get some basic protections and rights. While the 'perfect' franchise agreement no longer exists, a prospective franchisee should try to get all ten of the following terms in any franchise agreement.

(1) **A clear definition of the product or service.**A franchisee should know exactly what it is he is able to offer to the public. The franchisee can then make a fair assessment of whether the franchisee can make money by selling the product or service. The franchisee should also reach some level of comfort that, if he continues in the relationship, it will be able to handle the entire array of products and services currently being offered as well as all new and improved variations thereof.

(2) **Protection against same-brand competition.**Since a franchisee is often investing its life's savings, and its life's work, in building demand for the products and services in its trade area, it should be able to reap the benefits of those efforts without same-brand competition. The franchisee should seek out franchise systems that give 'true' exclusive territories and/or contractual protection from encroachment upon the franchisee's trade area by either other franchisees or the franchisor.

(3) **'Do the job, keep the line' duration.**A franchisee should be able to rest assured that, if it does a good job building demand for the products and services in its trade area, it will be able to continue as the only representative of that product line in its trade area so long as it continues to perform capably. Further, if its franchisor should ever believe it is not performing capably, it will not be abruptly terminated or not renewed. Rather, the franchisee will be given notice of perceived deficiencies and a reasonable opportunity to address the claimed deficiencies, with termination/nonrenewal to follow only if the perceived deficiencies are not adequately addressed. It should be noted that, typically, distributor and dealer agreements have 'early out' provisions for dealers and distributors; franchise agreements typically do not have 'early out' provisions for franchisees-something that, increasingly, is of interest to franchisees as they face dramatic changes in their franchisor/franchisee relationships, with no way to get out of good relationships that have turned bad . . . except by establishing a material breach by the franchisor.

(4) **Franchisors' obligations.**The franchisor should provide specifically in the franchise agreement that it will, in fact, provide some support to the franchisees. These services should be provided without charges above and beyond the royalties or other fees paid by the franchisees.

(5) **Franchisees' obligations.**The franchisee should look for a clear recitation of what is expected from it. If the franchisor reserves the right to make changes in the future in the franchisee's performance obligations, those changes should be subject to a 'reasonableness' covenant (and, ideally, should first be run through a franchisee board of advisors to confirm reasonableness before implementation).

(6) **Fair compensation.**While this is not technically a 'contract term,' a franchisee should have a reasonable belief that, if it works hard and does a good job, it will be able to make a good living, and that, as its sales increase, its income will increase at least proportionately (without fear that supervisory personnel in the home office will cut commissions or squeeze the margins of particularly high-performing people). In this regard, the agreement should not contain a 'no liability for termination' clause.

(7) **Ability to conduct other business.**Certain prospective franchisees may want to conduct their other businesses while a franchisee. This is particularly the case with 'investor' franchisees who will not be running the business. A franchisee must carefully review the in-term covenant not to compete to make sure that the other businesses are not a violation of the franchise agreement.

(8) **Fair dispute resolution procedures.**Franchisees should look for an agreement offering swift, evenhanded dispute resolution procedures. Franchisees should not necessarily object to arbitration or attorneys' fees provisions, provided the arbitration is in an acceptable venue, and the 'attorneys' fees provision' is reciprocal. Franchisees should avoid contracts where they are forced to disclaim otherwise available statutory protection, or unduly limit their right to recover damages from their franchisor if it breaches its duties. Franchisees should not mind indemnifying the franchisor for misdeeds that are the franchisees' own fault, provided the franchisor is willing to make a reciprocal indemnification promise (and provided that neither indemnification promise is too broad).

(9) **Right to sell/transfer.**A franchisee should have the ability to sell for fair value the business that he has built, or transfer the business to a son or daughter, without undue interference on the part of the franchisor. ('Reasonable discretion' with respect to the franchisor's right to approval is fine; arbitrary discretion is not.) Franchisees should try to avoid franchisor rights of first refusal, as such a term tends to depress the value of the business to a potential buyer. Franchisees should be increasingly worried, in this day of mergers among competitors, and leveraged buyouts, about the franchisor's unfettered right to assign its side of the contract. (There has been some success in challenging this allegedly 'unfettered right' to assign, utilizing the common-law doctrine of good faith and fair dealing to challenge transfers of franchisors' businesses that are likely to significantly damage, if not cause the demise of, the franchisees' businesses. [FN22])

(10) **The right to do something else.**If a franchisee is going to sell its business-particularly where the sale is forced by the franchisor-the franchisee should have the ability to make a living doing what he knows how to do (subject only to fair covenants against competition the buyers of his business might reasonably require).

These ten terms will go a long way toward creating a franchise relationship in which the franchisee has at least a fair chance of success. However, a prospective franchisee should also try to get the franchisor to add one additional term to the franchise agreement-an express covenant of good faith and fair dealing.

'The parties to this relationship agree to deal with each other honestly, fairly, in good faith, and in a nondiscriminatory, commercially reasonable manner.'

Such a provision is only fair.

FNa. (Deceased)

FNb. Member of the Minnesota and South Dakota Bars

Franchising Realities and Remedies § 1.03

FNc. Member of the Minnesota Bar

FNd. Member of the Minnesota Bar

FN1. 15 U.S.C. §§ 1055, 1064 (e)(1), 1127.

FN2. 15 U.S.C. § 1115(b)(7). See:
Fifth Circuit : Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977).
Tenth Circuit : Redd v. Shell Oil Co., 1974-2 CCH Trade Cas. ¶¶75,064, 75,390 and 75,392 (D. Utah 1974), rev'd on other grounds 524 F.2d 1054 (10th Cir. 1975), cert. denied 96 S.Ct. 1508 (1976) (forfeiture of Lanham Act benefits due to antitrust law violations).
See also, Brown and Cohen, 'Franchise Misuse,' 48 Notre Dame Law 1145 (1973).

FN3. See Mariniello v. Shell Oil Co., 511 F.2d 853 (3d Cir. 1975). See § 7.04 infra .

FN4. Such quality control must, however, be fair and reasonable both as to the formulation of the standards, in their application, and in their enforcement. See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977).

FN5. Fifth Circuit : Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480 (5th Cir. 1984).
Eighth Circuit : Bain v. Champlin Petroleum Co., 692 F.2d 43 (8th Cir. 1982); Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979), cert. denied 446 U.S. 918 (1980).
Compare:
Fourth Circuit : Picture Lake Campgrounds, Inc. v. Holiday Inns, Inc., CCH Bus. Franch. Guide ¶7574 (D. Va. 1980) (appeal pending).
State Courts:
Massachusetts : Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980).
See §9.08 infra, discussing fiduciary and good faith obligations.

FN6. See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) (collecting cases).

FN7. Palazzetti Import/Export, Inc. v. Gregory P. Morson and the Morson Group, Inc., d/b/a The Morson Collection, CCH Bus. Franch. Guide ¶11,757 (S.D.N.Y. 1999).

FN8. Michael J, Peter v. Stone Park Enterprises, CCH Bus. Franch. Guide ¶11, 750. (D. Ill. 1999).

FN9. S&R Corp. v. Jiffy Lube International, Inc., 968 F.2d 371 (3d Cir. 1992).

FN10. The definition was devised by the author in proposed legislation (see Brown, Franchising: Trap for the Trusting Appendix C (1970)). It has been substantially adopted in a number of states. See, for example:
Connecticut: Conn. Gen. Stat. Ann. §42-133e(b).
New Jersey: N.J. Stat. Ann. §35.6-1.
Washington: Wash. Rev. Code §252.1.
In order to lessen the burden of administration, some state and federal regulatory patterns have exempted from control those franchises in which the franchisee is not required to pay a direct or indirect sum of money to acquire the dealership. See, e.g., FTC Rule on Disclosure to Prospective Franchisees excluding franchises unless $500 is paid directly or indirectly within six months. See C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977).
See also:
Second Circuit: Automatic Comfort Corp. v. D & R Service, Inc., 50 BNA ATRR 376 (D. Conn. 1986)

(inapplicability of both federal Petroleum Marketing Act and Connecticut Fair Conduct in Franchising Act where gasoline dealer lacked essential characteristics of a franchise).
Seventh Circuit: E.A. Dickinson & Associate, Inc. v. Simpson Electric Co., 509 F. Supp. 1241 (E.D. Wis. 1981) (Wisconsin dealer act does not protect manufacturer's representative in absence of right to use trademark, although there was community of interest); Wilburn v. Jack Cartwright, Inc., CCH Bus. Franch. Guide ¶7645 (E.D. Wis. 1979) (Wisconsin's dealer protection act available against termination of manufacturer's sales representative based on trademark license and community of business activity; multistate dealer constitutionally covered where substantial portion of business within State).
Eighth Circuit: Rittmiller v. Blex Oil, Inc., 624 F.2d 857 (8th Cir. 1980) (denial of preliminary injunction against termination due to doubt whether service stations were 'franchisees' under Minnesota statutes).
State Courts:
California: California v. Kline, CCH Bus. Franch. Guide ¶7566 (Cal. App. 1980) (coverage where representation that business opportunity will be a franchise).
Connecticut: Muha v. United Oil Co., Inc., CCH Bus. Franch. Guide ¶7533 (Conn. 1980) (no franchise under original Connecticut franchise law prior to 1975 amendment since franchisor had no trade name of its own with which the franchisee's business could be associated).
Illinois: Brenkman v. Belmont Marketing, Inc., CCH Bus. Franch. Guide ¶7554 (Ill. App. 1980) (party's subjective decision not material as to whether arrangement is 'franchise' under three criteria of Illinois Franchise Disclosure Act).
Pennsylvania: Wilderness Industries of Maryland, Inc. v. Commonwealth of Pennsylvania, 427 A.2d 1235 (Pa. Comm. 1981) (Pennsylvania dealer law's application dependent on actual practices rather than written document).
Wisconsin: Wilburn v. Jack Cartwright, Inc., CCH Bus. Franch. Guide ¶¶7873 and 7874 (E.D. Wis. 1982) (Wisconsin Fair Dealer Law bars termination without good cause for manufacturer's sales representative where he sold the factory's product, with authority to use its trade name, and with a 'community of interest' between the agent and the manufacturer).
See also, California 'Guidelines for Determining Whether an Agreement Constitutes a 'Franchise," Dept. of Corp. 3-F, reported in CCH Bus. Franch. Guide ¶7558.

FN11. Metro All Snax, Inc. v. All Snax, Inc., CCH Bus. Franch. Guide ¶10, 885 (D. Minn. Mar. 21, 1996).

FN12. Romeo Maintenance & Rental v. U-Haul Co. of Minnesota, CCH Bus. Franch. Guide ¶12,259 (Minn. Dist. Feb. 13, 2002).

FN13. Pool Concepts v. Watkins, Inc., CCH Bus. Franch. Guide ¶12,249 (D. Minn. Jan. 29, 2002).

FN14. Tractor and Supply, Inc. v. Ford New Holland, Inc., CCH Bus. Franch. Guide ¶10,643 (W.D. Ky. 1995).

FN15. Courts have recognized the difficulty in discerning the marketing and functional relations in franchising, frequently resulting in rather controversial and conflicting rulings. In equitable claims, see: Arnott v. American Oil Co., 609 F.2d 873 (8th Cir.), cert. denied 446 U.S. 918 (1980), compared with Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980).
In anti-competitive matters, particularly under the rule of reason, see: Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980) cert. denied 451 U.S. 970 (1981), compared with : Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), cert. denied 445 U.S. 917 (1980); Northern v. McGraw-Edison Corp., 542 F.2d 1336 (8th Cir. 1976), cert. denied 429 U.S. 1097, rehearing denied 430 U.S. 960 (1977); and Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976).
In discerning the capital franchise market in an exclusionary claim, see: Hawkins v. Holiday Inns, Inc., 634 F.2d 342 (6th Cir. 1980) (appeal pending. Compare, Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir. 1978).

FN16. Some thorny problems have arisen concerning the obligations of both the franchisor and franchisee with regard to the trade name. See:

Second Circuit : Weight Watchers of Quebec, Ltd. v. Weight Watchers International, Inc., 523 F. Supp. 774 (E.D.N.Y. 1981) (exclusive territorial franchisees not able to show infringement by franchisor in its settling claim with third franchisee allowing for interim usage).
Third Circuit: General Business Services, Inc. v. Rouse, 495 F. Supp. 526 (E.D. Pa. 1980) (franchisor's obtaining preliminary injunction against use of wrongfully appropriated customer lists consisting of 1000 franchisees, trademark infringement, and unfair competition).
Fifth Circuit: Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976).
Sixth Circuit : Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) (city has no enforceable contractual right to compel franchised restaurant not to use trade name with racial overtones even though company so agreed in order to obtain city council approval).
Eighth Circuit : Northern v. McGraw Edison Co., 542 F.2d 1336 (8th Cir. 1976), cert. denied 429 U.S. 1097, rehearing denied 430 U.S. 960 (1977), cert. denied 429 U.S. 1097, rehearing denied 430 U.S. 960 (1977).
Ninth Circuit : Coca Cola Co. v. Overland, Inc., 43 BNA ATRR 1012 (9th Cir. 1981) (lawful effort to protect trademark, did not constitute sham anticompetitive device to coerce retailers to switch to its product).
Consequently, the franchisor must supply a valid trade name that is not merely an appropriation of a name in the public domain and must vigorously defend its misuse by third parties. See, for example: McDonald's Corp. v. Moore, 243 F. Supp. 255 (D. Ala. 1965), aff'd 363 F.2d 435 (5th Cir. 1966); McDonald's Corp. v. McDonald's, Inc., 806 BNA ATRR at A-24 (N.D. Ala. 1977).
Though business justifications might exist, the franchisor should be severely limited in his power to change the trade name or any significant part of the 'logo,' not only because of the inherent change in the value of the item which the franchisee has purchased, but more tangibly because of the franchisee's severe expense in changing signs. ('Logo' is a shorthand term coined by patent attorneys to refer to the trade name, trademark and service mark and all their related characteristics.)

FN17. See Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), cert. denied 451 U.S. 970 (1981) describing the foundation of a multi-faceted franchise package to increase the efficiency and success factors.

FN18. See Katz, 'Franchising-Pro and Con,' 76 Case and Comm. 8 (1971): 'The franchise theory as it has emerged into today's modern business world is a form of voluntary economic slavery which grows 'economically fat' slaves.' Mr. Katz was General Counsel for Aamco Industries, Inc.

FN19. See Brown, Franchising Realities and Remedies Forms Volume (Law Journal Press 1988).

FN20. See also, Bailey, 'A Form Unit Franchise Agreement,' 2 Ariz. St. L.J. 585 (1980).

FN21. See 15 U.S.C. §§ 1555 et seq .

FN22. For example, the Dady & Garner, P.A.. has been able to negotiate better terms for the Mrs. Field/Great American Cookie Company merger.

(2003)

FRANCHRR § 1.03
END OF DOCUMENT